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IN THE

Supreme Court of the United States

No. 473

WILLIAM H. SHERWOOD, Administrator with Will Annexed of the Estate of Floyd T. Brown, Deceased,
Petitioner,

vs.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT, A Body Corporate and Politic Organized Under and Existing by Virtue of the Laws of Mississippi, 1958,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No. _____

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PEARL RIVER VALLEY WATER SUPPLY DISTRICT, A Body Corporate and Politic Organized Under and Existing by Virtue of the Laws of Mississippi, 1958,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by William H. Sherwood, as Administrator with Will Annexed of the Estate of Floyd T. Brown, Deceased, for this Court's Writ of Certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit rendered in this cause on the 19th day of June, 1970. That opinion is not yet reported in the of-

ficial Federal reports, but attached as a part of the Appendix to this petition. Petitioner's complaint was earlier dismissed by the United States District Court for the Southern District of Mississippi, which also appears in the appendix. *Sherwood v. Pearl River Valley Water Supply District*, 301 F. Supp. 61 (S. D. Miss. 1969).

JURISDICTION

Jurisdiction of the United States District Court was based upon diversity of citizenship and amount in controversy under 28 U. S. C. § 1332. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U. S. C. § 1254 (1), in that the lands of the decedent were taken by the respondent by eminent domain in violation of the Equal Protection Clause of the Constitution of the United States.

The respondent was created by the Laws of Mississippi in 1958, and in 1962 began the process of taking the lands of the petitioner's decedent. That process has involved extended litigation which is summarized in the petitioner's complaint.

Based upon diversity and amount in controversy, petitioner filed a complaint in the United States District Court for the Southern District of Mississippi which alleged, as its main contention, that the respondent

> ". . . by eminent domain, and by deed under threat of eminent domain, and otherwise, has acquired all of the land area within a quarter mile of the perimeter of the reservoir created by it with the exception of lands belonging to or [which] where acquired by officers, employees and promoters of the defendant District, which were allowed to remain in their hands for private development . . ."

Complaint, ¶ 17. The selection by the respondent District of the lands of petitioner's decedent for taking, and the omission and failure to take lands of officers, employees and promoters of the respondent, constituted a denial of equal protection of the laws to petitioner's decedent.

The District Court sustained a motion to dismiss on grounds that the complaint failed to state a claim upon which relief could be granted, under principles enunciated in *Scott v. United States*, 190 F. 2d 134 (5th Cir. 1951).

Petitioner prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court on June 19th, 1970, as aforesaid.

Petitioner here contends that the complaint does state a claim upon which relief could be granted under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Does the complaint of the petitioner state a claim upon which relief could be granted under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION

Article XIV

Section 1. All persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citi-

zens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 6, 1962, the respondent District adopted a resolution of taking which determined and declared there to be a "necessity" for the condemnation of the petitioner's decedent's lands, and other lands belonging to his family. The sole issue presented by petitioner is whether the adoption of such resolution was arbitrary and capricious, and an abuse of the power vested in the respondent, which the petitioner is entitled now to raise by a complaint to the United States District Court.

ARGUMENT

A complaint stating facts which place in issue a condemnor's classification of property as being arbitrary and capricious, and under which an abusive exercise of its power to condemn might be found, states a claim upon which relief could be granted under the equal protection clause.

In the past decade, use of eminent domain has more than doubled. Federal funds, alone, are involved in the acquisition of more than 1,700,000 acres of land each year.[1]

Yet, during the decade that witnessed this massive growth in the use of condemnation, the scope of judicial

1. Staff of House Committee on Public Works, Select Subcommittee on Real Property Acquisition, 88th Cong., 2d Sess., STUDY ON COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 12-14. In 1963 condemnation affected 154,790 owners.

inquiry into the right of the condemnor to take which was described by this Court as "narrow" when *Berman v. Parker*, 348 U. S. 26, 75 S. Ct. 98, 99 L. ed. 27 (1954) was decided, has been further limited and restricted each succeeding year.

Some rules have grown up, some practices become prevalent, during this decade, that no member of the bar might have anticipated a decade ago. Nichols once said that one would search his law books in vain for the case of an innkeeper permitted to acquire a suitable site for his inn without the consent of the owner of the land, Nichols, *Eminent Domain*, 2d Ed., Section 7.21, but those were other days. The hot debate which once raged over the question of "excess" taking has devolved into the practice of "recoupment" condemnation, and that practice has become a fundamental concept in the law of eminent domain. *Comment*, 15 New York Law Forum 150 (1969), "Excess Condemnation".

During this decade of profound growth, this Court has remained almost entirely silent upon these serious and sweeping changes in an important area of law and national life. *Berman v. Parker*, supra; *County of Allegheny v. Frank Mashuda Company*, 360 U. S. 185, 79 S. Ct. 1060, 3 L. ed. 2d 1163 (1959), being the latest cases in which the power to take was analyzed and discussed.

There has grown a strange body of law whereby the judiciary has denied its own right to inquire into the power of the condemnor to take property, businesses, homes, except for those cases where abuse of power, or arbitrary and capricious selection, may be shown. Like a broken record, the Courts repeat the phrase "arbitrary and capricious" as the limitations of their power to review, but one may truly

search his lawbooks in vain for a case where the Court actually finds that such a condition exists, or that the power to take has been abused. Cf., *United States v. Carmack*, 329 U. S. 230, 67 S. Ct. 252, 91 L. ed. 209 (1946); *United States v. Mischke*, 285 F. 2d 628 (C. A. 8th Cir. 1961); *Colchico v. United States*, 286 F. Supp. 507 (1968); and the excellent and exhaustive *Comment*, 44 Washington Law Review 200 (1968) where the author states that "[i]n the State of Washington, for example, there have been only two such cases reported in seventy-seven years."

This case is one such. Here, the Pearl River Valley Water Supply District was created to build a reservoir under the "recoupment" theory of condemnation. *Comment*, 15 New York Law Forum 118, at 145. It was empowered to take lands within a quarter mile perimeter of the reservoir. This land would be leased or sold [Pearl River Valley Water Supply District Act, Ch. 197, Laws of Mississippi, 1958, § 11(v)] to private concerns for such public uses as motels, restaurants, marinas and summer homes, and the costs of the project would be thus "recouped". Under this delegation of power, the respondent selected the decedent's land, and took it.

In the process of taking, extensive litigation has been waged by both petitioner and respondent. An excellent, concise, summary of that litigation is shown in the foot note to the dissenting opinion of Judge Godbold in the opinion of the Fifth Circuit Court of Appeals in the appendix. Much of the litigation, in fact the great bulk of it, dealt with the valuation of the decedent's land, but an early [1962] proceeding attacked the public purpose of the taking. The circumstances under which this litigation was conducted are summarized in the Complaint.

The present suit raises a new question. The petitioner's Complaint alleges:

> "17. The defendant District, by eminent domain, and by deed under threat of eminent domain, and otherwise, has acquired all of the land area within a quarter mile of the perimeter of the reservoir created by it with the exception of lands belonging to or [which] were acquired by officers, employees and promoters of the defendant District, which were allowed to remain in their hands for private development; that the action of the Board of the Defendant District in declaring the lands of Floyd T. Brown, Deceased, to be necessary for the public purpose of the defendant District was therefore arbitrary and capricious, and denied the decedent equal protection of the laws afforded and secured to him by the Constitution of the United States of America."

It should be mentioned that the complaint raises this question with respect to only that portion of the real estate lying above the water line of the reservoir.

From this ugly issue, all except Circuit Judge Godbold have steadfastly turned their heads. The defendant District moved to dismiss on the ground that the complaint did not state a claim on which relief could be granted. The Federal District Court dismissed the question saying it was unwilling to "rehash" it. The Circuit Court majority refused to consider the question because it "should have been" raised earlier.

We now call on the respondent to point out to this Court in its brief any part of any record in this litigation that previously dealt with this issue. We offer to show that the majority of the facts upon which this petition is based had not occurred in 1962 when the earlier review of the right to take was litigated.

The questions transcend the simple issue of *res judicata*, which, for the reasons given by Judge Godbold, is not properly invoked, and for the reasons stated in the preceding paragraph is not factually applicable.

This Court, in *United States v. Carmack*, 329 U. S. 230, 67 S. Ct. 252, 91 L. ed. 209 (1946) found it was there

> ". . . unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned. The record presents no such issue here."

We respectfully submit that the case at bar presents exactly such an issue. 16 Am. Jur. 2d, § 540, p. 929; *State v. Simmons*, 153 Conn. 351, 216 A. 2d 632 (1966); *Comment*, 44 Washington Law Review 200, at 232 (1968).

In actuality, the District Court and the Circuit Court were not so much relying on *res judicata* and *Scott v. United States*, 190 F. 2d 134 (5th Cir. 1951) as expressing a profound weariness with the idea of "rehashing" some issue that "should have been" previously raised in this long litigation. The parties might dispute who has been most responsible for the length of this litigation. Both sides would agree with the lower Courts that it has been well nigh interminable. But we respectfully submit that length of litigation ought not be allowed as a defense to the abusive exercise of power.

Perhaps, because of the length of this litigation, the case is not a desirable factual situation for this Court to use in clarifying the present state of constitutional law in the area of eminent domain, upon which it urgently needs to

speak. But this case cannot be disposed of as was *United States v. Carmack*, supra, on the basis that the record presents no issue of bad faith.

It presents not only a claim upon which relief might be granted under the equal protection clause, but an offense against the dignity of governmental processes themselves. It deserves to be heard on both grounds.

CONCLUSION

The acceptance of the truth of the allegations in the Complaint makes the decision of the Circuit Court of Appeals constitutionally intolerable. We respectfully submit that the questions which the Complaint raises ought, even at this late hour in the litigation, to be tried on their merits. It is for such a hearing that the Administrator with Will Annexed of the Estate of Floyd T. Brown, Deceased, as petitioner, has brought them to this Honorable Court.

Respectfully submitted,
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CERTIFICATE

I, A. W. Storms, an Attorney for the Petitioner herein, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the 22nd day of July, 1970, I served five printed copies of the foregoing Petition for a Writ of Certiorari on Honorable Clifford C. Chittim, Attorney at Law, Box 427, Jackson, Mississippi, 39205, attorney for the Pearl River Valley Water Supply District, by air mail, in a duly addressed envelope, postage prepaid.

A. W. Storms

A. W. STORMS,
Attorney for William H. Sherwood,
Administrator with Will Annexed
of the Estate of Floyd T. Brown,
Deceased, Petitioner.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 27820

WILLIAM H. SHERWOOD, Administrator Will Annexed of the Estate of Floyd T. Brown, Deceased,
Plaintiff-Appellant,
versus
PEARL RIVER VALLEY WATER SUPPLY DISTRICT, A Body Corporate and Politic Organized Under and Existing by Virtue of the Laws of Mississippi, 1958,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

(June 19, 1970)

Before JONES, BELL and GODBOLD, Circuit Judges.

PER CURIAM: The facts of the case giving rise to this appeal are set forth in the reported opinion of the district court. *Sherwood v. Pearl River Valley Water Supply Dis-*

trict, S. D. Miss., 1969, 301 F. Supp. 61. In their contentions before this Court, as in the district court, both parties rely upon *Scott v. United States*, 5th Cir. 1951, 190 F. 2d 134. This Court is of the opinion, as was the district court, that the Scott decision supports the appellee's contentions rather than those of the appellant. All of the questions in this controversy have been, or should have been, fully litigated in prior actions.

The judgment of the district court is AFFIRMED.

GODBOLD, Circuit Judge, dissenting.

I am unable to join my colleagues in their disposition of this case.

As one of the grounds for relief against a state court judgment of condemnation, the appellant administrator alleged that by eminent domain, and by deed under threat of eminent domain, the defendant Water Supply District acquired all land within a quarter of a mile of the perimeter of the reservoir created by it "with the exception of lands belonging to or were acquired [sic] by officers, employees and promoters of the defendant District, which were allowed to remain in their hands for private development," so that the action of the District in condemning the land of the decedent as necessary for a public purpose was a denial of equal protection under the Constitution of the United States.

It was alleged that at the time of the state judgment of condemnation the decedent was living but was incompetent. The Water Supply District sought dismissal of the complaint in the instant case on grounds of lack of jurisdiction and failure to state a claim. The District Judge dismissed on the ground of res judicata. He considered

the equal protection claim in the context of whether it was a meritorious defense under *Scott v. United States*, 190 F. 2d 134 (5th Cir. 1951), which held a judgment against an incompetent merely voidable and subject to being set aside only if, in addition to insanity and lack of representation, there is a showing prima facie of a meritorious defense. He disposed of the equal protection claim in this paragraph:

> Assuming the correctness of the allegations as to Floyd T. Brown's incompetency and his lack of representation in the state court proceedings by a court-appointed guardian, *Scott* still requires of plaintiff a prima facie showing of a meritorious defense if the state court judgment is to be set aside. This Court finds the plaintiff's case wholly deficient in this regard. The plaintiff renews the now worn argument that the taking was not for a public purpose and suggests that the taking constituted a denial of equal protection of laws to Floyd T. Brown. This Court is not willing to rehash these questions after the exhaustive—and what it considers conclusive—litigation of these questions in the prior litigation involved as to this property, including the refusal of the U. S. Supreme Court to grant certiorari.

The District Judge erred in considering res judicata as an issue. It is not a defense under Rule 12(b), Fed. R. Civ. P., but an affirmative defense that must be raised under Rule 8(c). *Iacaponi v. New Amsterdam Casualty Co.*, 379 F. 2d 311 (3d Cir. 1967); *Johnson v. Mississippi Valley Barge Line*, 34 FRD 140 (W. D. Pa. 1963). Raising res judicata by motion rather than answer has been allowed in some instances where its existence may be adjudged on the face of the complaint. *Iacaponi v. New Amsterdam Casualty Co., supra; Cf., Guam Investment Company v. Central Building, Inc.*, 288 F. 2d 19 (9th Cir. 1961). But in this instance it was not raised in any manner.

The plaintiff attached to his complaint as exhibits reported and unreported state and federal decisions concerning this long controversy.[1] They reveal that the Brown family has attacked the condemnation authority of the District on the grounds that the takings are not for public use, and that there have been trials and appeals on valuation. None of the attachments shows that the equal protection question has ever been raised or litigated in any court. No records of any of this prior litigation, state or federal, were brought before the court as evidence or by summary judgment procedures. The motion to dismiss was unsupported by extrinsic documents.

> [B]efore an action may be summarily dismissed on the ground of res judicata the ends of justice require as a minimum that the defense of res judicata appear

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1. (1) Brown v. Pearl River Valley Water Supply District, 292 F. 2d 395 (5th Cir. 1961), affirming on ground of abstention the dismissal by the District Court of an action to enjoin all condemnations by the District on the ground that the taking was not for a public use.

(2) Brown v. Special Court of Eminent Domain, (Circuit Court of Madison County, Mississippi) denying petition for a writ of prohibition against condemnation, sought on the ground that the taking was not for a public use.

(3) Brown v. Pearl River Valley Water Supply District, 249 Miss. 697, 163 So. 2d 732 (1964), affirming the foregoing decision, with modification.

(4) Pearl River Valley Water Supply System v. Brown, 254 Miss. 685, 182 So. 2d 384, corrected 184 So. 2d 407 (1966), reversing for excessiveness a jury verdict in the condemnation proceeding.

(5) Pearl River Water Supply District v. Brown, 202 So. 2d 919 (Miss. 1967) affirming the jury verdict entered on remand on condition there be a remittitur, otherwise reversing and remanding for new trial for excessiveness.

(6) Pearl River Valley Water Supply District v. Brown, United States District Court, S. D. Miss., #4238 and 4238, (1968) remanding the state condemnation case to state court after removal, for want of diversity.

(7) Also attached were various documents from Mississippi and Nebraska courts having probate jurisdiction, relating to decedent's estate.

from the face of the complaint or that the record of the prior case be received in evidence.

Guam Investment Company v. Central Building, Inc., supra, at 24. Compare *Florasynth Laboratories v. Goldberg,* 191 F. 2d 877 (7th Cir. 1951) in which the motion to dismiss raised res judicata as a defense and described the former litigation, which occurred in the same court, and the trial judge had before him the opinion, findings and conclusions and entire record of the prior case.

Turning to the merits of the res judicata defense, on what is before us it appears that the District Judge mistakenly thought that he would be "rehashing" something previously decided. As already pointed out, none of the attachments to the complaint show prior litigation of the equal protection claim.

My brothers in this court seek to salvage the result by a four-word parenthetical phrase to the effect that if the question hasn't been litigated it should have been. The District Court gave no such reason. It first appears at the appellate level. If "should have been litigated" is to be considered as a basis for tossing a plaintiff out of court, it is all the more compelling that he be told of the contention by answer or motion, and the litigation identified, so that he has an opportunity to present, and support, his understanding of the scope and effect of the prior proceedings. On the merits of "should have been," there is no record on which this court can decide it. We know no more than the District Court. For example, for all we know from what is before us, some or all of the acts constituting the alleged denial of equal protection may have occurred after the litigation wherein my brothers say the plaintiff should have fully litigated the issue, or may have occurred at

such times and under such circumstances that raising them for the first time in this case is allowable.

I do not imply that plaintiff's charges either have merit or lack merit. But he is entitled to present them if he desires and to have them considered under appropriate legal standards. To date he has been swept out of court on motion to dismiss, by a Rule 8(c) defense, which sometimes can be raised by motion but in this case was not, and when raised by the District Court was erroneously decided on what was before it. And in this court he is left without remedy by an alternative construction of the 8(c) defense raised for the first time at the appellate level and not supported by the record.

I respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WILLIAM H. SHERWOOD, Administrator With Will Annexed of the Estate of Floyd T. Brown, Deceased,

Plaintiff

vs.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT, A Body Corporate and Politic Organized Under and Existing by Virtue of the Laws of Mississippi, 1958,

Defendant

CIVIL ACTION NO. 4388

Plaintiff William H. Sherwood is administrator of the estate of Floyd T. Brown. In this action, he attacks the validity of a state court judgment which upholds the taking of Floyd T. Brown's property by the Pearl River Water Supply District.

The plaintiff's basic contention is that Floyd T. Brown was non compos mentis at the time of the state court proceedings in which the validity of the taking of Mr. Brown's property was adjudged; and therefore that such proceedings denied Mr. Brown due process as guaranteed by the Fifth and Fourteenth Amendments.

The Water Supply District has filed a motion to dismiss, arguing that the principles enunciated by the Fifth Circuit in *Scott v. United States*, 190 F. 2d 134 (5th Cir. 1951), dictate a summary dismissal of this action. The Court agrees.

The Water Supply District condemned 630.2 acres of

property belonging to Floyd T. Brown and his family, all of which Floyd T. Brown himself originally owned and all of which has been operated as a single farming unit.[1] The Browns have contested the taking for over eight years in both the state and federal courts. The judgment which Floyd T. Brown's administrator attacks here is that of the Madison County Circuit Court denying a writ of prohibition, rejecting the Browns' argument that the taking here was for a private, rather than a public, purpose and thus violative of section 17 of the Mississippi Constitution which prohibits taking of private property for non-public use. The Mississippi Supreme Court affirmed the Madison County Circuit Court in *Brown v. Pearl River Water Supply District*, 163 So. 2d 732 (1964).

The writ of prohibition trial consisted of a consolidation of three cases involving members of the Brown family, including Floyd T. Brown's suit. Through stipulation, the testimony and evidence in yet a fourth case involving members of the Brown family, J. Leland and Mrs. Amis Brown, and this same 630.2 acre tract were incorporated in the record of the consolidated writ of prohibition suits. In the companion case, involving J. Leland and Mrs. Amis Brown, the Mississippi Supreme Court had found the taking to be for a public purpose. *Pearl River Water Supply District v. Brown*, 156 So. 2d 572 (1963), *cert. den., Brown v. Pearl River Water Supply District*, 376 U. S. 970 (1964).

In each of these proceedings all members of the Brown

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1. See Brown v. Pearl River Water Supply District, 163 So. 2d 732, 732-33 (1964): "Floyd T. Brown owned all of this land [the 630.2 acres] until April, 1960. At that time he conveyed 44.3 acres, more or less, to one son, J. Leland Brown, and 549.2 acres, more or less, to another son, F. Stanton Brown, and retained in his own name 204.1 acres, more or less. Shortly thereafter J. Leland Brown conveyed to his wife, Mrs. Amis Brown, ten of the acres conveyed to him by his father."

family were represented by the same attorneys and these attorneys, plus one, represent Floyd T. Brown's administrator in the present action. Having been rebuffed by a federal district court, the Fifth Circuit, the Madison County Circuit Court twice, the Mississippi Supreme Court twice, and the United States Supreme Court—always on essentially the same question as to the public vs. private purpose of the taking—the Brown attorneys are back in Court, this time on behalf of the estate of the progenitor of all the Browns who have litigated the taking of the 630.2 acre tract. They acknowledge the controlling weight to be accorded the *Scott* case, *supra*, by devoting much of their brief to distinguishing it from the instant case. In *Scott*, the Fifth Circuit said:

> "The mere mental incompetency of a person does not preclude a court from acquiring jurisdiction over his person, nor deprive it of the power to adjudicate his property rights. Lack of proper representation of a mental incompetent does not of itself render a judgment against him void. Such a judgment is merely voidable, good until set aside on a direct attack. Even then the judgment will not be set aside unless, in addition to insanity and lack of representation, a meritorious defense is *prima facie* shown." 190 F. 2d at 137.

Assuming the correctness of the allegations as to Floyd T. Brown's incompetency and his lack of representation in the state court proceedings by a court-appointed guardian, *Scott* still requires of plaintiff a prima facie showing of a meritorious defense if the state court judgment is to be set aside. This Court finds the plaintiff's case wholly deficient in this regard. The plaintiff renews the now worn argument that the taking was not for a public purpose and suggests that the taking constituted a denial of equal protection of the laws to Floyd T. Brown. This

Court is not willing to rehash these questions after the exhaustive—and what it considers conclusive—litigation of these questions in the prior litigation involved as to this property, including the refusal of the U. S. Supreme Court to grant certiorari.

However, this Court need not base its decision solely on the *Scott* case and plaintiff's failure to show a meritorious defense. Although Floyd T. Brown was not represented by a guardian, his interests were vigorously advanced in the state court proceedings. His attorneys—the same ones who represent his estate here—were present and surely advanced every defense possible to the taking; his case was consolidated with two others involving members of his family, both of which involved parties competent at the time of trial and whose interests were identical with those of Floyd T. Brown; a companion case was prosecuted by J. Leland and Mrs. Amis Brown, whose interests also were identical with those of Floyd T. Brown, and in which case the Madison County Circuit Court and Mississippi Supreme Court reached similar results as in Floyd T. Brown't suit. All these suits involved property carved from a single tract originally owned by Floyd T. Brown and which continued to be operated as a single farming unit; and in each of the cases the same attorneys who represent Floyd T. Brown's administrator represented the particular member of the Brown family involved. It is hard for the Court to visualize such a difference in issues or problems of representation between the suit of Floyd T. Brown and those of other members of the Brown family that any defense available to Floyd T. Brown would not have been raised and fully aired. In short, this Court is convinced that Floyd T. Brown's incompetence at the time of trial, which this Court assumes to be the fact, had no effect whatsoever on the ultimate outcome of the

litigation as to the validity of the taking of his property. Under such circumstances, this Court finds no denial of due process in proceeding without the alleged incompetent.

The motion of the defendant to dismiss will therefore be granted. A judgment accordingly may be presented.

Walter L. Nixon, Jr.,

United States District Judge

March 19th, 1969

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No. 473

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

WILLIAM H. SHERWOOD, Administrator with Will Annexed of the Estate of Floyd T. Brown, Deceased ..... Petitioner

vs.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT, A Body Corporate and Public Organized Under and Existing by Virtue of the Laws of Mississippi, 1958 ..... Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Pearl River Valley Water Supply District v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963) 248 Miss. 4, 158 So. 2d 694 (1963) (costs), cert. den. 376 U.S. 970, 12 L.Ed. 2d 84 (1964) 1, 4, 6

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Sherwood v. Pearl River Valley Water Supply District, No. 27820 (5th Cir. June 19, 1970) 2, 4

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 473

WILLIAM H. SHERWOOD, Administrator with Will Annexed of the Estate of Floyd T. Brown, Deceased ..... Petitioner

vs.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT, A Body Corporate and Public Organized Under and Existing by Virtue of the Laws of Mississippi, 1958 ..... Respondent

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

The petitioner's land was condemned by the Pearl River Valley Water Supply District and taken through eminent domain proceedings in 1962. There is no question about the constitutional validity of these proceedings. *Pearl River Valley Water Supply District v. Brown*, 248 Miss. 4, 156 So.2d 572 (1963), 248 Miss.

23, 158 So.2d 694 (1963) (costs), cert. den., 376 U.S. 970, 12 L.Ed. 2d 84 (1964). The petitioner now contends that new facts have arisen since 1962 which have prejudiced his rights. The District Court, *Sherwood v. Pearl River Valley Water Supply District*, 301 F. Supp. 61 (S.D. Miss. 1969) and the Circuit Court of Appeals, *Sherwood v. Pearl River Valley Water Supply District*, No. 27820 (5th Cir. June 19, 1970) (Pet. App. pp. 11-16) have both denied his claim on the ground that it fails to state a claim for which relief can be granted.

JURISDICTION

1. Petitioner totally fails to meet the jurisdictional requirements for a Writ of Certiorari.

The petitioner asks for review by Writ of Certiorari under 28 U.S.C. § 1254(1). In the annotations to this statute, 28 U.S.C.A. § 1254 pp. 66-67, a multitude of cases[1] are given in support of the following proposition: "Jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments or to secure uniformity of decision."

In a decision rendered in 1892, *In re John Woods and Stephen B. Lovejoy*, 143 U.S. 202, 136 L.Ed. 125 (1892), the Court dismissed a petition for Writ of Certiorari asking for review of a Circuit Court of Appeals' final judgment in a personal injury suit, stating that the Circuit Courts of Appeal were created for the purpose of relieving the Supreme Court of the

[1] Among these are: In the Matter of John Woods and Stephen B. Lovejoy, 143 U.S. 202, 36 L.Ed. 125 (1892) (personal injury); Thomas M. Fields v. United States, 205 U.S. 292, 51 L.Ed. 807 (1907) (criminal); Houston Oil Company of Texas v. Cornelia G. Goodrich, 245 U.S. 440, 62 L.Ed. 385 (1918) (title dispute).

"oppressive burden of general litigation." The necessity that the Supreme Court be relieved of burdensome general litigation by the Circuit Courts of Appeal is even greater in 1970. The Court, therefore, should strictly construe United States Supreme Court Rule 19. 1. which now embodies the long established principle that "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

The petitioner's claim falls into the category of general litigation. The allegations of the petitioner clearly show that the claim for relief is not one of peculiar gravity and general importance, but is simply general litigation. In fact this litigation grows out of a routine eminent domain suit under state law, Miss. Code Ann. (1956) § 5956-60. While the petitioner attempts to make his claim worthy of review by giving the impression that the Court has failed to review eminent domain cases during the last decade, the contrary seems to be true. During the 1960s the Court entertained many eminent domain cases concerning a great variety of issues. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 4 L.Ed. 2d 584 (1960) (taking Indian Reservation land for a storage reservoir of a hydroelectric power project); *Cecil W. Armstrong v. United States*, 364 U.S. 40, 4 L.Ed. 2d 1554 (1960) (right of materialmen to resort to the specific property for the satisfaction of their claims); *United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 5 L.Ed. 2d 838 (1961) (value of a flowage easement); *Thomas N. Griggs v. County of Allegheny*, 369 U.S. 84, 7 L.Ed. 2d 585 (1962) (taking of an air easement); *Madeline C. Shroeder v. City of New York*, 371 U.S. 208, 9 L.Ed.

2d 255 (1962) (adequacy of notice); *Raymond R. Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 9 L.Ed. 2d 350 (1963) (effect of pending administrative proceedings while condemnation suit was being litigated); *H. P. Dugan v. Everett G. Rank*, 372 U.S. 609, 10 L.Ed. 2d 15 (1963) (diversion of water); *City of Fresno v. State of California*, 372 U.S. 627, 10 L.Ed. 2d 28 (1963) (rights to underground water); *United States v. Louis T. Mortz*, 376 U.S. 192, 11 L.Ed. 2d 629 (1964) (assessment of damages); *United States v. R. B. Rands*, 389 U.S. 121, 19 L.Ed. 2d 329 (1967) (compensation for lands' value as a port site); *The National Board of Young Men's Christian Associations v. United States*, 395 U.S. 85, 23 L.Ed. 2d 117 (1969) (damage to buildings by rioters).

ARGUMENT

Issue: Whether the Petitioner has been denied his constitutional right to due process of law.

The petitioner bases his request for appeal to the Supreme Court on the allegation that new facts have arisen since 1962[2] which entitle him to another trial on the right to take. He relies primarily on Judge Godbold's dissent in the Fifth Circuit Court of Appeals Decision, supra, stating that the petitioner has a right to a new trial on the charges made because the previous cases are not res judicata on this issue. In his dissent (Pet.App. pp.14-15) Judge Godbold cites *Guam Investment Co. v. Central Building, Inc.*, 288 F.2d 19 (9th Cir. 1961), and *Florsguth Laboratories v. Goldberg*, 191 F.2d 877 (7th Cir. 1951) as authority that the res

[2] The 1962 eminent domain proceedings were held to be for a legitimate public purpose rather than a private purpose as alleged by petitioner. Pearl River Valley Water Supply District v. Brown, 248 Miss. 4, 156 So.2d 572 (1963), 248 Miss. 23, 158 So.2d 694 (1963) (costs), cert. den., 376 U.S. 970, 12 L.Ed. 2d 84 (1964).

judicata approach taken by the District Court, supra, and affirmed by the Fifth Circuit, supra, was erroneous because the action to dismiss failed to offer extrinsic documents in support of the res judicata defense. The fine procedural point relied upon by the Petitioner is insufficient to warrant further prolongation of this litigation. The majority of the Fifth Circuit, after studying the long history of this litigation dating back to 1959, agreed with the District Court opinion, supra, that the case should be dismissed. Judge Nixon, the District Court judge, on pages 62-63 of his opinion, gave the following history of the litigation:

> The Water Supply District condemned 630.2 acres of property belonging to Floyd T. Brown and his family, all of which Floyd T. Brown himself originally owned and all of which has been operated as a single farming unit. The Browns have contested the taking for over eight years in both the state and federal courts. The judgment which Floyd T. Brown's administrator attacks here is that of the Madison County Circuit Court denying a writ of prohibition, rejecting the Browns' argument that the taking here was for a private, rather than a public, purpose and thus violative of section 17 of the Mississippi Constitution which prohibits taking of private property for non-public use. The Mississippi Supreme Court affirmed the Madison County Circuit Court in Brown v. Pearl River Valley Water Supply District, 249 Miss. 697, 163 So. 2d 732 (1964).
>
> The writ of prohibition trial consisted of a consolidation of three cases involving members of the Brown family, including Floyd T. Brown's suit. Through stipulation, the testimony and evidence in yet a fourth case involving members of the Brown

family, J. Leland and Mrs. Amis [sic] Brown, and this same 630.2 acre tract were incorporated in the record of the consolidated writ of prohibition suits. In the companion case, involving J. Leland and Mrs. Amis [sic] Brown, the Mississippi Supreme Court had found the taking to be for a public purpose. Pearl River Valley Water Supply District v. Brown, 248 Miss. 4, 156 So.2d 572, 158 So.2d 694 (1963), cert. den., Brown v. Pearl River Valley Water Supply District, 376 U.S. 970, 84 S.Ct. 1136, 12 L.Ed. 2d 84 (1964).

After giving this history the trial court made the following comment at page 63:

> Having been rebuffed by a federal district court, the Fifth Circuit, the Madison County Circuit Court twice, the Mississippi Supreme Court twice, and the United States Supreme Court—always on essentially the same question as to the public vs. private purpose of the taking—the Brown attorneys are back in Court. . . .

We submit that Judge Nixon's opinion clearly reflects that, whether or not the previous cases were res judicata as to the present issue, they establish such a strong precedent that it would be useless to have yet another trial between these litigants on this particular subject matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel for Respondent

CERTIFICATE

I, L. Arnold Pyle, the Attorney for the Respondent herein, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the 21 day of August, 1970, I served five printed copies of the foregoing Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Honorable A. W. Storms, Attorney At Law, 417 East Avenue, Holdrege, Nebraska, Attorney for William H. Sherwood, Administrator with Will Annexed of the Estate of Floyd T. Brown, Deceased, Petitioner, by United States Airmail, in a duly addressed envelope, postage prepaid.

L. Arnold Pyle

L. ARNOLD PYLE
Attorney for Pearl River Valley Water Supply District, Respondent